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By email and mail service

October 12, 2018
Lilian Dorka
Director
External Civil Rights Compliance Office
Office of General Counsel
U.S. Environmental Protection Agency Headquarters
William Jefferson Building
1200 Pennsylvania Avenue, N.W.
Mail Code: 1201A
Washington, D.C. 20460

Re: Title VI Civil Rights Complaint (EPA No. 16R-17-R4) and Petition for Relief or Sanction – Alabama Department of Environmental Management’s Renewal of Solid Waste Permit No. 62-11 for Operation of Stone’s Throw Landfill in the Ashurst Bar/Smith Community in Tallapoosa County, Alabama

Dear Director Dorka,

We submit this letter in support of the above-captioned complaint on behalf of the Complainant, Ashurst Bar/Smith Community Organization (“ABSCO”). ABSCO includes many current and former residents of the Ashurst Bar/Smith community in Tallassee, Alabama who have suffered from the harmful impacts of the Stone’s Throw Landfill (the “Landfill”) for nearly two decades, despite repeated complaints to the Alabama Department of Environmental Management (“ADEM”) and the External Civil Rights Compliance Office (“ECRCO”) of the Environmental Protection Agency (“EPA”). Settled by formerly enslaved persons after the Civil War and Emancipation, Ashurst Bar/Smith is a historic community where land has been handed down from

generation to generation—a heritage that has been devastated by the Landfill, with ADEM’s repeated and continued approval. The myriad harms experienced by this community are summarized below and detailed in the attached exhibits and previously submitted materials. This evidence makes clear that ADEM’s decision to renew and reissue the Landfill’s Permit to operate in the Ashurst Bar/Smith community, *see* Ala. Dep’t of Env’tl. Mgmt., Solid Waste Permit No. 62-11, Tallassee Waste Disposal Ctr., Inc., Stone’s Throw Landfill (Feb. 10, 2017) (“Permit No. 62-11”) (the “Permit”), has a discriminatory and disproportionate impact on the basis of race in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (“Title VI”) and EPA’s nondiscrimination regulations, 40 C.F.R. Part 7.

To be clear, the disparate adverse impacts felt by the predominantly Black Ashurst Bar/Smith community is a direct consequence of ADEM’s cumulative decisions to issue and reissue operating permits for the Stone’s Throw Landfill over time. But for ADEM’s 2017 decision to reissue the Permit, the Landfill could not operate in this location. Significantly, this Landfill is located in the heart of a historic community, on land that was and is a source of pride, heritage, and wealth for its Black owners. For ABSCO, ADEM’s decision is a denial of equal protection of the health and welfare of the Black community. This history provides the context for ABSCO’s complaint. After decades of inaction, EPA must insist that ADEM take community concerns seriously, that ADEM investigate the impacts of the Landfill on the community, that any operating Permit (if the facility is allowed to operate) require mitigation of harms, and that there be significant effort to restore the health and quality of life for the Ashurst Bar/Smith community.

The following letter-brief outlines the applicable legal standard and summarizes the adverse impacts experienced by the Ashurst Bar/Smith community.¹

¹ Complainant does not bear the burden of proof in demonstrating discrimination. *See* ENVTL. PROT. AGENCY, EXTERNAL CIVIL RIGHTS COMPLIANCE OFFICE, COMPLIANCE TOOLKIT 3, 12-13 (Jan. 18, 2017)

I. Introduction

On February 10, 2017, ADEM renewed and reissued the operating permit for the Tallassee Waste Disposal Center (for Stone’s Throw Landfill) in the Ashurst Bar/Smith community. Pursuant to the Permit granted by ADEM, the Landfill is approved to receive 1,500 tons of waste per day from all Alabama counties and three counties in Georgia, making it one of the largest landfills in the state. *See, e.g.*, ADEM, PERMITTED MUNICIPAL SOLID WASTE LANDFILLS IN THE STATE OF ALABAMA, <http://www.adem.state.al.us/programs/land/landforms/MSWLFMasterList10-15.pdf> (last visited Oct. 10, 2018); *see also* Comparison of Key Provisions of Municipal Solid Waste Facilities in Alabama (as of 2016), compiled by Elvis Acheampong & Caleb Northrop, Yale School of Forestry and Environmental Studies (Oct. 10, 2018) (“Ala. Facility Comparison”) (Exh. 1). The Permit allows the Landfill to accept non-hazardous solid waste including, among other things, commercial waste, industrial waste, construction and demolition debris, sludge from wastewater treatment plants, and special waste, including coal ash, subject to ADEM approval. Permit No. 62-11, at 7-9; *see also* Letter from Lance LeFleur, Dir., Ala. Dep’t of Env’tl. Mgmt., to Herman Kitchens, Tallassee Waste Disposal Ctr., Inc. 1 (Feb. 10, 2017).

As a result of ADEM’s repeated renewal and reissuance of Landfill operating permits, the historic and vibrant Black community of Ashurst Bar/Smith has been devastated. Today, residents are unable to open their windows or spend time outside because of noxious odors, vermin, and concerns about adverse health impacts stemming from operations at the Landfill. Even though

(“EPA TOOLKIT”). Complainant nonetheless provides ample evidence of the adverse impacts that the Landfill imposes on the community, including everyday interference with the enjoyment of property, impacts on property values, particulate emissions, excess noise, and effects on water quality. Even if EPA finds that Complainant has provided insufficient evidence of either adverse impacts or that such impacts were causally related to the permit, EPA must further investigate Complainant’s claims and outstanding questions. *Id.*

ABSCO has repeatedly raised concerns with ADEM, ADEM has reissued essentially the same operating permit for the Landfill every five years without significant modifications or adequate protections for the health and welfare of the community.² Most recently, ADEM reapproved the Landfill's permit application and reissued the Permit on February 10, 2017. ADEM reissued the Permit with several variances, without ascertaining baseline knowledge of conditions that might contraindicate such variances. Before issuing the Permit, ADEM did not, to our knowledge, fully investigate or address any of the former Title VI allegations from the 2003 complaint.

ECRCO should find that ADEM's February 10, 2017 approval and reissuance of the Permit for the operation of Stone's Throw Landfill in the Ashurst Bar/Smith community in Tallapoosa County, Alabama violates Title VI of the Civil Rights Act of 1964 and EPA's nondiscrimination regulations. The renewed and reissued Permit has a disparate, adverse impact on the health, safety, and right to enjoyment of property for Black residents living in proximity to the Landfill.

II. Factual Background

The predominantly Black community of Ashurst Bar/Smith in Tallassee, Alabama was founded just after the U.S. Civil War and, thus, long predates the operation of Stone's Throw Landfill. Comments of Ex. 6 Personal Privacy (PP) ¶ 2 (Summer 2016) (Exh. 13). Indeed, the Landfill, which is owned currently by Advanced Disposal, the fourth largest solid waste company in the United States, has operated under its current ownership structure since 2002. *See* ADVANCED DISPOSAL, STONE'S THROW LANDFILL, <https://www.advanceddisposal.com/al/tallassee/stones-throw-landfill> (last visited Oct. 10, 2018). The families of Ashurst Bar/Smith have resided in the community for upwards of six generations. They are primarily descendants of formerly enslaved persons who, current residents believe, received rare federal land grants prior to and at the end of the Civil War.

² ADEM made minor changes to the permit regarding total acreage, acreage allowed for disposal operations, the number and status of monitoring wells, and the alternate final cover system. *See infra* note 12.

Decl. of [Ex. 6 Personal Privacy (PP)] 7 (Nov. 15, 2016) (Exh. 15). For many Black families in Alabama, land ownership was impossible until the passage of the Civil Rights Act of 1964. *See, e.g.,* Roy W. Copeland, *In the Beginning: Origins of Black Real Property Ownership in the United States*, 44 J. BLACK STUDIES 646, 646-47 (2013). Ashurst Bar/Smith is a unique community due to its unbroken lineage of Black property ownership, which makes its preservation all the more crucial.

Beginning in 1999,³ residents of Ashurst Bar/Smith have filed numerous complaints, ranging from previous allegations that ADEM has violated Title VI through its administration of permit issuances and modifications regarding Stone's Throw Landfill, to, more recently, nuisance claims against the landfill. *See, e.g., Tarver v. Advanced Disposal Services South, LLC.* (Macon Cty. Cir. Ct. July 27, 2018).

A. Previous Complaints Submitted to ADEM

Prior to ADEM's approval of the Landfill's Permit application in 2017, members of the community immediately surrounding the Landfill raised a number of concerns about the operation of the Landfill with ADEM, asking ADEM to reject the Landfill's application for continued operation. This included a complaint filed on December 8, 2000, by community residents, alleging that ADEM violated Title VI in approving a 2003 permit modification for Stone's Throw Landfill. EPA accepted the complaint for investigation on September 7, 2005. *See, e.g.,* Letter from Karen

³ In 1999, ABSCO, then called the Ashurst Bar/Smith Community Landfill Opposition, joined other community-based groups from across Alabama that filed a complaint with EPA alleging that ADEM violated Title VI and EPA's implementing regulations by concentrating municipal solid waste landfills in predominantly Black communities in Alabama, when the landfills serviced predominantly white communities. ENVTL. PROT. AGENCY, OFF. OF CIVIL RIGHTS, INVESTIGATIVE REPORT FOR TITLE VI ADMINISTRATIVE COMPLAINT FILE NO. 28R-99-R4 (YERKWOOD LANDFILL COMPLAINT) 3, 10 (July 2003) ("YERKWOOD COMPLAINT"). Notably, the Yerkwood Complaint raised many of the same issues that continue to plague Ashurst Bar/Smith today: 18-wheeler trucks speeding by community roads even at 10 or 11 at night, truck accidents, wear and tear on country roads, impacts on cultural life, including on the New Zion Church, strong odors, and psychological impacts and lack of self-worth resulting from being in a community known for its proximity to a dump. Letter from Luke Cole, Ctr. on Race, Poverty & the Env't, to Carol Browner, Admin., Env'tl. Prot. Agency 7 (Dec. 17, 1999).

Higginbotham, Dir., Env'tl. Prot. Agency, Off. of Civil Rights, to [Ex. 6 Personal Privacy (PP)] (Sept. 7, 2005). EPA closed this investigation on April 25, 2017, finding that it had insufficient evidence that the permit modification caused the alleged disparate impacts.⁴

B. Residents Raised Concerns About the Impacts of the Operation of the Landfill Pursuant to the Permit with ADEM Prior to ADEM's 2017 Issuance of the Permit

The community in close proximity to the Landfill has found daily life severely and disproportionately impacted by the activities of Stone's Throw Landfill. Residents cannot sit on porches or exit their homes without being inundated by noxious odors emitting from the Landfill, yet the Permit's daily cover requirements do not provide adequate cover to mitigate odor. *See* Permit No. 62-11, at 8; Decl. of [Ex. 6 Personal Privacy (PP)] ¶¶ 17-23 (Aug. 1, 2018) (Exh. 14); [Ex. 6 Personal Privacy (PP)] Decl. ¶ 12 (Exh. 15). Residents encounter vermin from the Landfill, despite the Permit's vector control requirements. [Ex. 6 Personal Privacy (PP)] Decl. ¶ 29 (Exh. 14); [Ex. 6 Personal Privacy (PP)] Decl. ¶ 14 (Exh. 15). Residents have experienced adverse health effects including asthma and other health outcomes that have been linked to breathing in the same particulates released by the Landfill in statistically significant studies. *See* ROBERT DUBROW ET AL., AIR QUALITY IMPACTS OF THE STONE'S THROW LANDFILL IN TALLASSEE, ALABAMA: A PILOT STUDY (2018) ("PILOT STUDY") (Exh. 6). It is incontrovertible that the Landfill has an adverse impact on the quality of the life of Ashurst Bar/Smith residents and this adverse impact merits thorough investigation by EPA.⁵

⁴ On January 25, 2013, EPA finally issued a letter concluding that there was no evidence that ADEM intentionally discriminated against Black residents of Ashurst Bar/Smith during the public involvement process for the permitting of a modification to the Tallassee Waste Disposal Center, Inc. Approximately four years later on April 25, 2017, EPA issued a response to the second allegation, stating there was insufficient evidence to conclude that ADEM violated Title VI and EPA's nondiscrimination regulation in regard to the 2003 permit modifications at issue.

⁵ As described below, a disparate impact claim does not have a knowledge element nor require demonstration that the recipient had knowledge of impacts. Nonetheless, ADEM's decision to continue permitting this facility without additional analysis of the disparate impacts or more protective permit provisions is even more stark given the record of notice here.

On November 17, 2016, ABSCO asked ADEM to deny Stone's Throw Landfill's permit renewal because ADEM failed to conduct and consider a disproportionate impact analysis. Letter from Marianne Engelman Lado, Earthjustice & Leah C. Aden, NAACP LDF, *et al.*, to Russell A. Kelly, Chief of Permits & Services Div., Ala. Dep't of Env'tl. Mgmt. 3 (Nov. 7, 2016). Without that analysis, ADEM could not know whether the Permit had a disparate impact on the basis of race and, thus, whether granting the Permit would comply with Title VI and EPA implementation regulations. At least 200 community members participated in a hearing regarding the Permit reissuance, and community members filed comments during the comment period. *See, e.g.*, [Ex. 6 Personal Privacy (PP)] Comments ¶¶ 2 & 4 (Exh. 13); Comments [Ex. 6 Personal Privacy (PP)] ¶¶ 2-3 (Summer 2016) (Exh. 11); Letter from Smith, Pres., ABSCO, to Russell A. Kelly, Ala. Dep't of Env'tl. Mgmt. (Nov. 15, 2016) [Ex. 6 Personal Privacy (PP)] (Exh. 16). As ADEM acknowledged in its SUMMATION OF COMMENTS RECEIVED AND RESPONSE-TO-COMMENTS, PROPOSED STONE'S THROW LANDFILL RENEWAL, PERMIT NO. 62-11 1-2, 4 (Feb. 10, 2017) ("ADEM RESPONSE TO COMMENTS"), community members raised concerns that, among other things, the Landfill was not adequately covering garbage on a daily basis, the Landfill emitted odor and dust, trees in the area were dying, soil was negatively impacted, seepage was affecting fish and wildlife, and residents were experiencing a range of health problems as a result of the Landfill. *Id.* ABSCO further claimed that ADEM has engaged in a pattern of discriminatory permit modification, expansion, and renewal decisions without analyzing whether these actions had a disproportionate impact. *Id.* Despite these comments, ADEM nonetheless issued the Permit without adequate modifications, effectively ignoring resident complaints, comments, and community impact and without evaluating whether the operation of the Landfill under the Permit would have a disproportionate impact on the basis of race.

III. Legal Background

Complainant alleges that ADEM violated Title VI of the Civil Rights Act and EPA's implementing regulations by (1) utilizing inadequate methods of administration and criteria, including but not limited to the failure to examine whether the permit has a disparate impact, with the result of disproportionately and adversely affecting African Americans; and (2) permitting the Landfill with site-specific permit provisions and variances that have adverse and disproportionate impacts. Even though Complainant does not bear the evidentiary burden of proving disparate impact, as discussed *infra*, Complainant has presented sufficient evidence for EPA to make a finding of discrimination for these claims.

A. Regulatory Framework

Under Title VI of the Civil Rights Act, “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 42 U.S.C. § 2000d. Section 602 of Title VI directs federal agencies to promulgate regulations specifying how the agency will determine if recipients of federal funds are engaging in racially discriminatory programs or practices prohibited by Title VI. *Id.* § 2000d-1.

EPA's implementing regulations broadly prohibit discrimination on the basis of race, color, or national origin under any program or activity receiving EPA assistance. 40 C.F.R. § 7.30. Because ADEM is a recipient of federal funds as defined by 40 C.F.R. § 7.25,⁶ ADEM's programs

⁶ “EPA assistance means any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which EPA provides or otherwise makes available assistance in the form of [f]unds . . .”. 40 C.F.R. § 7.25. To cite but one example, EPA awarded a grant to ADEM for \$13,523,604 from 10/01/2017 to 09/30/2022 “to support the State of Alabama Department of Environmental Management (ADEM)[‘s] efforts to protect its citizens and the environment by reducing air pollution, improving water quality through permitting and enforcement and compliance efforts, reducing hazardous waste and improving waster [sic] management, preserving

and activities are subject to this regulation, including ADEM's solid waste disposal permitting program. EPA regulations also contain a non-exclusive list of prohibited discriminatory actions, *see id.* § 7.35(d) ("The specific prohibitions of discrimination enumerated above do not limit the general prohibition of § 7.30."), and clearly state that recipients of EPA funds are prohibited from taking these actions "directly or through contractual, licensing, or other arrangements." *Id.* § 7.35(a). As such, ADEM may not discriminate through licensing—that is, by reissuing a permit that has the effect of discriminating on the basis of race. *See id.* § 256.06 ("The term 'permit' includes any functional equivalent such as a registration or license.").

Significantly, EPA's regulations state:

A recipient shall not use criteria or methods of administering its program or activity which *have the effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex, *or* have the effect of defeating or substantially impairing accomplishment of the objectives of the program or activity with respect to individuals of a particular race, color, national origin, or sex.

Id. § 7.35(b) (emphasis added). ADEM is thus prohibited from (1) using criteria or methods of administering its program which have the effect of subjecting individuals to discrimination on the basis of race, or (2) "defeating or substantially impairing" the objectives of its programs or activities in a racially disproportionate manner. *Id.*

In this context, 40 C.F.R. § 7.35(b) forbids ADEM from administering its permit program, reissuing the permit, or approving variances for the permit in a way that imposes disparate harms on the Ashurst Bar/Smith community. Likewise, the Alabama Solid Wastes Disposal Act ("SWDA") tasks ADEM with "protect[ing] the public health and the state's environmental quality and . . . serv[ing] the public." ALA. CODE § 22-27-41. This broad statutory mandate, together with

underground drinking water sources, and returning brownfields safely to productive use." USASPENDING, ENVTL. PROT. AGENCY AWARD ID 96464618, <https://www.usaspending.gov/#/award/47909058> (last visited Oct. 10, 2018).

EPA's nondiscrimination regulations, makes clear that ADEM, through its permitting program, may not impair in a racially disproportionate manner its objective of protecting public health and environmental quality. Disparate impact claims do not require a showing of animus or knowledge. At the same time, ADEM's failure to thoroughly investigate concerns raised by community members, conduct demographic analysis, and impose more stringent permit conditions is all the more unreasonable in light of its acute awareness of ABSCO's disparate impact allegations. ADEM has administered its permit program in a manner that defeats, or at least substantially impairs, in a racially disproportionate manner, ADEM's objective of protecting the public health.

B. Elements of a Disparate Impact Claim

The relevant legal standard for establishing a *prima facie* case of discrimination is the adverse disparate impact or discriminatory effects standard. *Guardians Ass'n. v. Civil Serv. Comm'n*, 463 U.S. 582, 593 (1983); *Alexander v. Choate*, 469 U.S. 287, 293 (1985); DEP'T OF JUSTICE, DOJ TITLE VI LEGAL MANUAL, SECTION VII: PROVING DISCRIMINATION—DISPARATE IMPACT 9 (Apr. 13, 2017) ("DOJ MANUAL, SECTION VII"). As described in more detail below, to establish adverse disparate impact, the investigating agency must:

- (1) identify the specific policy, practice, or decision at issue;
- (2) establish adversity/harm;
- (3) establish disparity; and
- (4) establish causation.⁷

⁷ The Yale Environmental Justice Law Clinic, NAACP Legal Defense & Educational Fund, Inc., and the Ashurst Bar/Smith Community Organization submitted a Freedom of Information Act ("FOIA") request on August 14, 2018. Pursuant to FOIA (5 U.S.C. § 552), complainant groups requested the following: All documents disseminated in EPA's possession containing information regarding how EPA defines and evaluates the element of causation in its investigation of claims pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) et seq. and its implementing regulations, 40 C.F.R. Part 7, from January 1, 2012 to the present. The tracking number for the FOIA request is EPA-HQ-2018-010543.

See DOJ MANUAL, SECTION VII, at 9.

1. Specific Discriminatory Policy, Practice, or Decision at Issue

Complainants identify at least two discriminatory actions by ADEM that disparately impact the Ashurst Bar/Smith community. *First*, ADEM administers its program with methods and criteria that have a disparate impact on African Americans in violation of 40 C.F.R. § 7.35(b). Despite nearly two decades of civil rights complaints concerning the Landfill, ADEM has not, to our knowledge, conducted any demographic analysis or otherwise investigated Complainant's allegations. ADEM's failure to evaluate whether the Permit has an unjustified disparate impact is particularly egregious given that this facility has been the subject of civil rights complaints for more than a decade. *See, e.g.*, Letter from Karen D. Higginbotham, Dir., Env'tl. Prot. Agency, to Luke Cole, Ctr. on Race, Poverty & the Env't and Cal. Rural Legal Assistance Found. & James W. Warr, Dir, Ala. Dep't. of Env'tl. Mgmt. 7 (July 1, 2003) (filed in EPA File No. 28R-99-R4). Indeed, in 2003 EPA cautioned ADEM that its "failure to *adequately* consider socio-economic impacts (including race) at any point in the siting and permitting process for municipal solid waste landfills in Alabama" created a "significant potential" for failure to comply with Title VI. *Id.* (emphasis added). Thus, by continually reissuing the Permit every five years without investigating disparate impact or even attempting to mitigate adverse harms by imposing stricter permit conditions, ADEM has administered its permitting program in a manner that subjects the residents of Ashurst Bar/Smith to discrimination on the basis of race. Moreover, ADEM's methods of administration "have the effect of defeating or substantially impairing" the objectives of ADEM's waste management program, namely to protect the public health and the state's environmental quality." 40 C.F.R. § 7.35(b); ALA. CODE § 22-27-41.

Second, ADEM's approval of the Permit, taken as a whole and especially in regard to site-specific variances, has adverse and disproportionate impacts. ADEM has considerable discretion in stipulating the terms of its solid waste permits, provided that ADEM also satisfies its statutory mandate of protecting public health and environmental quality. In the case of Stone's Throw Landfill, however, ADEM has not only reissued the permit but has also authorized several site-specific variances that have the effect of exacerbating the very harms complained of by the Ashurst Bar/Smith community for years in its Title VI complaints and elsewhere. Undoubtedly, the reissued Permit, coupled with these variances, will again result in a disparate impact on African Americans in contravention of EPA regulations at 40 C.F.R. §§ 7.30 and 7.35.

2. Adversity

To establish adversity, the investigating agency must determine if the alleged consequences of the action are harmful. *S. Camden Citizens in Action v. New Jersey Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446, 487 (discussing the methods used to "evaluate the 'adversity' of the impact" and considering whether the impacts at issue were "sufficiently adverse" to establish a prima facie case), *rev'd on other grounds*, 274 F.3d 771 (3d Cir. 2001). "[A]dversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm." *Bryan v. Koch*, 627 F.2d 612, 617 (2d Cir. 1980); *see also* DOJ MANUAL, SECTION VII, at 12. As explained in detail below, residents have endured impacts and injuries stemming from the Landfill that are significant and substantial in nature. Some of these impacts are manifest, such as odor, interference with quality of life, and impacts on property value. Should EPA find that additional information is required to make findings of adversity as to particular outcomes, ECRCO should conduct its own rigorous, fact-driven investigation of the harms imposed by ADEM's renewal of the Permit.

Significantly, environmental standards and regulations fail to capture the full range of harms felt by a community, such as a devaluation of property value and other social harms. *Id.* at 4 (“EPA will also consider non-health harms, including, among other things, economic (e.g., depressed property values), nuisance odors, traffic congestion, noise and vermin. With respect to the non-health harms alleged (e.g., economic, traffic, noise), Title VI allows agencies to consider whether these effects are occurring and, if so, whether they are sufficiently harmful to support a violation finding.”). Such non-health impacts are cognizable in civil rights claims, and EPA’s evaluation of disparate impact on the predominantly Black Ashurst Bar/Smith community would be incomplete and inadequate if arbitrarily limited to quantifiable health effects.

Unlike EPA’s 2017 decision on the 2003 complaint, which concerned a permit modification, allegations accepted for investigation in this case concern a permit *reissuance*. EPA guidance gives some support for limiting the analysis in the modification context to the effects of only the new or modified provisions. In this case, since the subject of the investigation is a permit reissuance, the investigation must evaluate the impacts of the whole Permit and the full range of impacts, including potential harms, on the Ashurst Bar/Smith community.

Moreover, ADEM’s decision to reissue the Permit has resulted in disparate impact irrespective of whether the Landfill has violated environmental health standards set pursuant to the Clean Water Act, Clean Air Act, or other environmental statutes. Technical compliance with environmental standards is not a standard for whether programs or activities have an “adverse impact” within the meaning of Title VI. While *noncompliance* with an environmental or health standard may be sufficient to find adverse impacts in some contexts, such noncompliance is not a *necessary* element of a disparate impact claim. *Compliance* with an environmental standard does not negate otherwise valid evidence of harm or disparity under civil rights law. *See* EPA TOOLKIT,

at 2 (“If in a given circumstance you are complying with applicable environmental laws, that fact alone does not necessarily mean that you are complying with federal civil rights laws”). Title VI imposes civil rights obligations, independent of environmental laws and standards, and there is no legal basis for tying the analysis of adversity in a civil rights disparate impact claim to compliance with environmental standards developed under completely different statutory mandates.⁸

3. Racial Disparity

In evaluating racial disparity, “EPA analyzes whether a disproportionate share of the adversity/harm is borne by individuals based on their race, color, national origin, age, disability or sex.” *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 576-77 (2d Cir. 2003). Under this standard, EPA must find disparity if ADEM’s permit renewal and approval of permit variances for the Landfill adversely affect a significantly higher proportion of protected class members in Ashurst Bar/Smith than non-protected class members. *Id.*; see also DOJ MANUAL, SECTION VII, at 15. As indicated by EPA’s Environmental Justice Screening and Mapping Tool, 73% of the population within 1 mile of the Landfill is classified as “minority”—in this case, almost entirely African American. Env’tl. Prot. Agency, EJ Screen Demographic Indicators (data accessed Oct. 11, 2018) (“EJ Screen”) (Exh. 2). The differential between the racial composition of the affected population and reference groups meets the “significantly higher proportion” standard.

⁸ In its Toolkit, ECRCO also presents a hypothetical Title VI case involving compliance with National Ambient Air Quality Standards (“NAAQS”). ECRCO explains, “The fact that the area is designated as in attainment with the NAAQS and that the recent permitting record shows that emissions from the facility would not cause a violation of the NAAQS would be insufficient by themselves to find that no adverse impacts are occurring for purposes of Title VI and other federal civil rights laws. EPA’s investigation would seek to ascertain the existence of such adverse impacts (e.g., violations of the NAAQS) in an area regardless of the area’s designation and the prior permitting record. As stated previously, compliance with environmental laws does not necessarily constitute compliance with federal civil rights laws.” EPA TOOLKIT, at 12-13.

4. Causation

To establish the element of causation in a disparate impact claim, EPA must discover evidence that gives rise to an inference that the challenged policy or practice is a cause, but for which, the adverse harm would not have occurred. In a disparate impact claim, plaintiffs must “allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities.” *N.Y.C. Env’tl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2000). Likewise, “the plaintiff cannot make out a prima facie disparate impact claim if the evidence tends to show that even had the defendant not engaged in the challenged practice, the same disparate impact would nonetheless have existed.” *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993).

The Department of Justice’s (“DOJ’s”) Title VI Legal Manual elaborates on the causation analysis in the context of an environmental justice disparate impact claim:

[E]nvironmental justice cases often involve allegations that a recipient’s action or inaction causes harm or that the recipient’s permitting of a third party facility causes the harm. In these cases, establishing causation may involve scientific or other quantifiable proof that the challenged practice actually caused the alleged adverse impacts. *This may involve proof connecting a specific facility to a specific adverse impact, such as harmful health effects, odor, noise, decrease in property values, etc.* When such proof is not obtainable, [] statistical tests . . . will suffice.

DOJ MANUAL, SECTION VII, at 28 (emphasis added). DOJ’s causation analysis links “a specific facility to a specific adverse impact,” indicating that the adverse impact caused by the facility establishes the causation element of a disparate impact claim in the context of permitting. *Id.* Since ADEM has reissued the Permit, EPA must look to the impacts of the Landfill to analyze causation. DOJ also explains that “statistically significant” evidence is sufficient to give rise to an inference of causation. *Id.* at 27 (citing *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988)).

The causation standard involves a determination of whether adverse harms would not have occurred but for the specific policy, practice, or decision at issue. Under this standard, EPA must first identify adverse impacts, then determine if those impact would have been present regardless of whether ADEM reissued the Permit for the Landfill. Only if EPA determines that the adverse harms would have existed independent of the Landfill's operation can EPA establish that there is no causation. Many of the harms alleged by Complainant are clearly attributable to the Landfill, such as putrid odors, noise from garbage trucks, and persistent pests. And as discussed in detail below, an independent expert has averred, with 99% confidence, depreciation in property value likewise stems from the Landfill. *See* ERMANN AFFUSO, THE IMPACT OF LANDFILLS ON THE VALUE OF RESIDENTIAL PROPERTIES IN ALABAMA 2 (Oct. 1, 2018) ("PROPERTY VALUE STUDY") (Exh. 3).⁹ Moreover, these harms are sufficient to give a statistically significant inference of causation. *Id.* Residents of the Ashurst Bar/Smith community have offered anecdotal evidence for nearly two decades that conforms with this data.

As discussed more fully below, ADEM has provided no justification for its disregard for community concerns, failure to evaluate disparate impacts, and ultimately its reissuance of the Permit, including approving more permissive site-specific variances. Even if ADEM were to demonstrate "a substantial legitimate justification" for its permitting decisions, ADEM would nonetheless violate Title VI if the evidence showed that "less discriminatory alternatives exist." EPA TOOLKIT, at 9-10 (*citing Elston*, 997 F.2d at 1413). To this end, Complainant has compiled a list of less discriminatory alternatives, *see infra* Section VII, to which ADEM has provided no rebuttal. ADEM has the authority to require more protective permit provisions, as evidenced by

⁹ *See also* Ermanno Affuso, *curriculum vitae* (2018) (Exh. 4); Ermanno Affuso et al, *Social Media Sentiment and Market Behavior*, EMPIRICAL ECONOMICS (May 26, 2018) (related theoretical paper) (Exh. 5).

the comparison of permit provisions across the state, *see* Ala. Facility Comparison (Exh. 1), and ADEM is obliged, under Title VI and EPA's nondiscrimination regulations, to use its authority to mitigate adverse impacts to the Ashurst Bar/Smith community.

C. Burden of Proof

Complainant does not have the burden of proof, but has nonetheless provided ample information to support a finding of discrimination. ENVTL. PROT. AGENCY, EXTERNAL CIVIL RIGHTS COMPLIANCE OFF., CASE RESOLUTION MANUAL 15 (January 18, 2017). Should EPA conclude that the record is currently insufficient to support a finding of discrimination, Complainant calls on EPA to follow up on the evidence and conduct a full investigation.¹⁰

IV. All Elements of a Title VI Disparate Impact Claim Are Satisfied

ADEM is prohibited from (1) using criteria or methods of administering its program which have the effect of subjecting individuals to discrimination on the basis of race, and (2) "defeating or substantially impairing" the objectives of its programs or activities in a racially disproportionate manner. ADEM's decision to renew the Permit, allowing the Landfill to operate without greater protections for the health and welfare of the Ashurst Bar/Smith community, constitutes a violation of the prohibition from (1) using criteria or methods of administering ADEM's solid waste program that has the effect of subjecting individuals to discrimination on the basis of race, and (2) defeating or substantially impairing the objectives of ADEM's solid waste program in a racially discriminatory manner.

First, in granting renewal of the permit, despite a previous complaint alleging that the operation of the facility has a racially discriminatory impact and numerous complaints about the adverse impacts of the Landfill on the Ashurst Bar/Smith community, ADEM disregarded

¹⁰ Complainant has also met jurisdictional requirements. *See* 40 C.F.R. § 7.120(b).

community concerns and failed to analyze whether the Permit complied with Title VI and EPA regulations.¹¹ See Transcript, Public Hearing on Application to Modify Permit Stone's Throw Landfill Permit No. 62-11 (November 10, 2016) (Exh. 7); Ex. 6 Personal Privacy (PP) (Exh. 16); Ex. 6 Personal Privacy (PP) Comments (Exh. 13); Gauntt Comments (Exh. 11); Letter from ABSCO, to Russell A. Kelly, Ala. Dep't of Env'tl. Mgmt. (Nov. 17, 2016) ("ABSCO Comments") (Exh. 18). Indeed, ADEM granted renewal of the Permit with essentially the same terms that had been in effect under the previous version of the Permit, without additional protections.¹² ADEM's approach to permitting allows

¹¹ ADEM failed to conduct any analysis of whether the Permit violates Title VI and EPA regulations prior to granting reissuance. ECRCO (formerly the Office of Civil Rights) previously warned ADEM that a failure to consider socio-economic impacts, including race, "could lead, in the future, to ADEM-permitted landfills that have an adverse disparate impact on a population protected by EPA's Part 7 regulations. Letter from Karen D. Higginbotham, Dir., EPA OCR, to Luke Cole, Ctr. on Race, Poverty & the Env't, and Cal. Rural Legal Assistance Found., & James W. Warr, Dir., ADEM, at 7 (July 1, 2003) (filed in EPA File No. 28R-99-R4); see *supra* Section II.B. Furthermore, as this is a permit reissuance, ADEM's failure to conduct an analysis of the minimum six siting factors including, "the social and economic impact that any proposed location would have on the affected community, including changes in property values and social or community perception," when Tallapoosa County Commission ("TCC") failed to do so adequately, is not only a method of administration with a disparate impact but also constitutes a discriminatory siting decision. See 40 CFR § 7.35(c) ("A recipient shall not choose a site or location of a facility that has the purpose or effect of ... discrimination under any program or activity ... on the grounds of race, color or national origin...; or with the purpose or effect of defeating or substantially impairing the accomplishments of the objectives of this subpart."). A failure to conduct a discriminatory impact analysis can establish a violation of Title VI. See *S. Camden Citizens in Action*, 145 F. Supp. 2d at 481 (D.N.J. 2001). For example, the court in *S. Camden Citizens in Action* stated that NJED's failure to conduct an analysis of the racially disparate adverse impact of the facility in question prior to granting an air permit was a violation of Title VI. *Id.* at 446. ADEM's failure to conduct such analyses should be investigated with respect to the racially disproportionate harms imposed on the residents of Ashurst Bar/Smith described below. See also Letter from Peter M. Rogoff, Admin., Fed. Transp. Admin., to Steve Heminger, Exec. Dir., Metro. Transp. Comm'n & Dorothy Dugger, Gen. Mgr., Bay Area Rapid Transit (January 15, 2010); see also Letter from Peter Rogoff, Admin., Fed. Transp. Admin., to Steve Heminger, Exec. Dir., Metro. Transp. Comm'n & Dorothy Dugger, Gen. Mgr., Bay Area Rapid Transit (February 12, 2010).

¹² The total permitted area was increased from approximately 123.47 acres with 65.88 acres permitted for MSW disposal operations to approximately 175.39 acres with 124.57 acres permitted for MSW disposal operations. See Permit No. 62-11, Section III.2. Table IV.1. included changes to the upgradient/background monitoring wells (414.31 abandoned) and downgradient monitoring wells (additional monitoring wells (MW-14, MW-15, MW-16) and additional wells to be installed); Permittee was approved to construct an alternate final cover system consisting of 12 inch thick infiltration layer, 50 mil textured LLDPE liner, geocomposite drainage media, 12 inch protective soil cover layer and 6 inches of topsoil erosion layer capable of supporting vegetative cover. See Permit No. 62-11, Section VIII.A. The variance requiring all waste to be confined to as small an area as possible included the following additional language "all waste shall be spread to a depth not exceeding two feet prior to compaction, and such compaction shall be

the Landfill to continue to operate in a manner that has adverse and disproportionate impacts on the basis of race.

Furthermore, in order to receive federal funds from EPA, ADEM must aver that it is in compliance with Title VI, and an analysis of whether the permit has a disparate impact is necessary to confirm compliance. *See* ENVTL. PROT. AGENCY, FORM 4700-4: PREAWARD COMPLIANCE REVIEW REPORT FOR ALL APPLICANTS AND RECIPIENTS REQUESTING FEDERAL FINANCIAL ASSISTANCE (June 2014) (Question VIII: “Does the applicant/recipient maintain demographic data on the race, color, national origin, sex, age, or handicap of the population it serves?”). ADEM cannot ensure compliance without conducting disparate impact analyses as part of its permitting process.¹³

In addition, ADEM’s decision to grant a permit renewal for the Landfill substantially defeats the objective of ADEM’s solid waste program in a racially discriminatory manner. ADEM’s solid waste program, is intended “to enforce sanitary requirements,” ALA. CODE § 22-27-7, and to “protect the public health and the state's environmental quality” through the “orderly management of solid wastes.” *Id.* § 22-27-41. The renewed Permit allows the Landfill to continue operating under provisions that have already devastated the Ashurst Bar/Smith community by interfering with quality of life, raising significant concerns about health impacts, and depreciating land value, among other things. When taken as a whole, ADEM’s decision to renew the Landfill’s Permit clearly has unjustified disparate adverse impacts.

accomplished on a face slope not to exceed 3 to 1 or as otherwise approved by the Department.” Permit No. 62-11, Section X.5.

¹³ ADEM’s methods of administration also violate Title VI and EPA regulations in that ADEM fails to comply with EPA’s foundational requirements. ADEM is not complying with the procedural safeguard provisions delineated in 40 C.F.R. Part 7, Subpart D, which require recipients of EPA financial assistance to have specific policies and procedures in place to comply with their affirmative non-discrimination obligations.

Among other things, ADEM's decision to grant specific variances, discussed in greater detail below, creates significant risks and exacerbates adverse impacts on the community. These include, in particular, variances waiving the obligation to confine waste to as small an area as possible and allowing an additional working face, *see* Permit No. 62-11, Section X.5,¹⁴ which together, increase air pollution and interfere with enjoyment of property and quality of life. ADEM also allows the Landfill to utilize tarps as well as contaminated soils and petroleum-contaminated soils as alternate daily cover, *see* Permit No. 62-11, Section X.6,¹⁵ which increase air pollution and create risks of contaminating waters when rain washes over the open face. A comparison of permits approved by ADEM for municipal solid waste facilities ("MSWFs") indicates that a number of other permits have no variance allowing alternate daily cover; of those that do, many have more protective provisions than the Permit for Stone's Throw, including requirements that facilities utilize a more limited set of alternatives. *See, e.g.,* Ala. Dep't of Env'tl. Mgmt., Solid Waste Permit No. 41-03, Salem Waste Disposal Center (Aug. 5, 2013), Section III.H (only approved to utilize a spray-on, polymer-based materials, automobile shredder fluff, or a reusable geosynthetic cover as an alternate daily cover, which may have fewer issues with odor, runoff, and water pollution relative to contaminated soil and petroleum-contaminated soil permitted at

¹⁴ Permit No. 62-11, Section X.5 provides: "The Permittee has been granted a variance from ADEM Rule 335-13-4-22(1)(b) requiring all waste to be confined to as small an area as possible. The Permittee shall be allowed to an additional working face in order to place a fluff layer in each newly constructed cell while at the same time continuing to reach final elevation in the current cell. The purpose of this second working face is to limit types of material that might damage the liner during the initial placement of waste in the new cell. All waste shall be spread to a depth not exceeding two feet prior to compaction, and such compaction shall be accomplished on a face slope not to exceed 3 to 1 or as otherwise approved by the Department."

¹⁵ Permit No. 62-11, Section X.6 provides: "The Permittee may utilize tarps as alternate daily cover. The Permittee may utilize contaminated soils and petroleum contaminated soils as alternate daily cover. The Permittee may utilize auto shredder residue as alternative daily cover. Contaminated soils and petroleum contaminated soils and the auto shredder residue may only be used to cover the cell's interior slopes, deck, and workface. If an alternative cover is utilized, the Permittee shall be required to cover the active cell with six inches of earthen cover at the conclusion of each week's activities."

Stone's Throw);¹⁶ Ala. Dep't of Env'tl. Mgmt., Solid Waste Permit No. 51-01, North Montgomery Landfill (June 6, 2017), Section III.H (only approved to utilize Posi Shell Cover System as alternate daily cover).¹⁷

Finally, ADEM approved leachate recirculation, despite acknowledging “recurring side slope outbreaks,” and other indicators of the potential for buildup of leachate and discharge. *See* Permit No. 62-11, Sections X.2 & X.4.¹⁸ By comparison, ADEM approved leachate recirculation for only 8 other MSWFs permitted by ADEM out of a total of more than 30. Ala. Facility Comparison (Exh. 1).

ADEM's renewal of the Permit with insufficient protection of the community's health and welfare has adversely impacted the members of the Ashurst Bar/Smith community. The harms experienced by those living in close proximity to the Landfill are varied and numerous. Such harms, described in more detail in the following sections, include water runoff; smell; heavy truck traffic and unsafe road conditions; proliferation of insects, rodents, and vultures; negative impacts on surface and groundwater; reduced property values; adverse health consequences; and diminution of quality of life.

¹⁶ “The Permittee has been granted approval to utilize a spray on, polymer-based material, automobile shredder fluff or a reusable geosynthetic cover as alternative daily cover.” Ala. Dep't of Env'tl. Mgmt., Solid Waste Permit No. 41-03, Salem Waste Disposal Center (Aug. 2, 2013), Section III.H.

¹⁷ “The Permittee has been approved to utilize Posi Shell Cover System as an alternate daily cover. The Permittee is required to follow the manufacturer's specifications on mixing and applying the alternate daily cover.” Ala. Dep't of Env'tl. Mgmt., Solid Waste Permit No. 51-01, North Montgomery Landfill (June 6, 2017), Section III.H.

¹⁸ Permit No. 62-11, Sections X.2 & X.4 provide: “The Permittee has been approved for leachate recirculation. Leachate recirculation will be accomplished by installing small diameter PVC pipes within the waste lifts similar to a field bed. The pipes will be abandoned in place as the next lift of waste is placed and new pipes will be installed in the next waste lift. The Permittee has been approved to re-circulate leachate on the working face.”; “As part of the April 13, 2010 modification, the Permittee included plans for addition of a temporary side slope drainage system, to control recurring side slope outbreaks, to the Design and Operation Plan. The side slope drainage system shall be installed after other conventional methods, such as a clay plug, has failed. The system will either be removed or abandoned in place as the filling sequence dictates and outbreaks are controlled.”

Moreover, these adverse impacts disproportionately affect a predominantly Black community. Tallapoosa County is majority white and the communities serviced by the Landfill are majority white. *See* EJ Screen (Exh. 2); U.S. CENSUS BUREAU, QUICKFACTS HARRIS COUNTY, GEORGIA, <https://www.census.gov/quickfacts/harriscountygeorgia> (last visited Oct. 12, 2018); U.S. Census Bureau, QuickFacts Muscogee County, Georgia, <https://www.census.gov/quickfacts/muscogeecountygeorgia> (last visited Oct. 12, 2018); U.S. Census Bureau, QuickFacts Troup County, Georgia, <https://www.census.gov/quickfacts/troupcountygeorgia> (last visited Oct. 12, 2018).¹⁹ However, the Ashurst Bar/Smith community, which is 98% Black,²⁰ bears the burden of the waste disposal of the county and state, as well as the associated negative consequences. *Id.*

V. ADEM Has Broad Authority and Regulatory Powers to Ensure Compliance with Title VI Obligations

ADEM holds plenary authority over an integrated solid waste disposal planning and permitting program that regulates nearly every aspect of solid waste disposal in Alabama. The SWDA makes clear that Alabama does not bifurcate duties relating to solid waste management between state and local governing bodies. Rather, the SWDA expresses a “legislative purpose” of “comprehensive local, regional, and state planning,” and legislative intent “to develop an integrated system” in which the state and local governing bodies work together to manage waste. Ala. Code §§ 22-27-41 & 22-27-42. Under this established framework, ADEM has broad supervisory powers:

¹⁹ Aggregating data from the entire state of Alabama and the three Georgia counties from which the Landfill is approved to receive waste (Harris, Muscogee, Troup), the area the Landfill services is majority white.

²⁰ Though using a radius of 1 or 2 miles, the EJ Screen report demonstrates a significantly higher population of African Americans living in proximity to the Landfill than in the county or the Landfill’s service area taken as a whole, it still underestimates the disparity. Using the boundaries of the neighborhood rather than a radius, the percentage of African Americans is greater than the EJ Screen report, as suggested by ABSCO’s estimations.

First, ADEM has “primary authority” over solid waste management in Alabama as “necessary to enforce the requirement and purposes of [SWDA].” *Id.* § 22-27-9; *see also id.* § 22-27-7 (conferring regulatory authority upon ADEM); *id.* § 22-27-12 (conferring regulatory authority upon ADEM). Moreover, ADEM has the authority to issue administrative orders and initiate civil actions to enforce the SWDA and its regulations. *Id.* § 22-27-11.

Second, ADEM may deny permit applications based on noncompliance with SWDA, its implementing regulations or federal law. *Id.* § 22-27-12(2) (“The department may condition the issuance of a permit for any solid waste management or materials recovery facility upon the facility being consistent with applicable rules as are necessary to carry out the intent of this article and the department’s responsibilities under this article); *see also id.* § 22-27-5(b) (clarifying that approval of ADEM is “in addition to other approvals which are necessary,” such as approvals by county commissions).

Third, local governing bodies such as TCC are required to consider “[t]he social and economic impacts of a proposed facility on the affected community.” *Id.* § 22-27-28(a). Since ADEM has the authority to deny permit applications based on noncompliance with the SWDA, ADEM may deny permit applications for failing to consider demographic factors, including disparate impact.

Fourth, ADEM has the authority to revoke permits for “good cause.” This “good cause” includes disparate impacts caused by facilities such as the Landfill. *Id.* § 22-27-5(c) (“Such permit shall be based upon performance and may be revoked for cause, including failure to perform under the provisions of this article and regulations adopted under authority of this article.”).

ADEM’s broad regulatory authority over solid waste permitting in Alabama and the legislative intent behind the relevant code sections, indicate that ADEM cannot dismiss its Title

VI obligations by claiming it lacks authority over the Landfill's Permit issuance or by passing off the responsibility for compliance to TCC.

ADEM has previously stated that it is discharged of responsibility to comply with Title VI in the permit renewal context because it is not directly selecting the location of the facility. *See* ADEM RESPONSE TO COMMENTS, at 6-7 (“ADEM reiterates that it does not site landfills, the local host government approves siting....”); Letter from Lance R. LeFleur, Dir., Ala. Dep’t of Env’tl. Mgmt., to Rafael DeLeon, Dir., Env’tl. Prot. Agency, Off. of Civil Rights (July 19, 2012) (disclaiming responsibility for Title VI compliance on the ground that permitting decision did not require reconsideration of Landfill location). ADEM is, however, responsible for approving permits, including their location. Nonetheless, ADEM asserts “that its duty under Alabama law is solely to determine ‘the technical suitability of the site selected’ [and] contends that all it can do is ‘deny a permit if the site is environmentally unsuitable for a landfill.’” YERKWOOD COMPLAINT, at 12; *see also* ADEM RESPONSE TO COMMENTS, at 6.

On the contrary, ADEM has the authority to regulate landfill practices and implement less discriminatory alternatives. ADEM has broad statutory authority to place health and safety requirements on landfills through the promulgation of general regulations, which are then incorporated into individual permits. *See* ALA. CODE § 22-27-12(1) (granting ADEM the authority to adopt rules to implement the regulation of waste facilities); *id.* § 22-27-12(3) (granting ADEM the power to issue permits and to “specify the terms and conditions of permits”). ADEM also has the power to place such requirements on landfills through conditions placed on individual permits at the agency’s discretion. *See* ALA. ADMIN. CODE r. 335-13-4.11 (establishing that nothing in ADEM’s hydrogeology standards “shall prevent the Department from requiring an additional buffer as it may deem appropriate with respect to a particular site”, among other things); *id.* r. 335-

13.4.15 (“[D]aily, weekly, or some other periodic cover shall be required at all landfill units, as determined by the Department.”); *id.* r. 335-13-4.16(b) (discussing discretion regarding requirements to install permanent gas monitoring structures, gas vents, gas control or recovery systems); *id.* r. 335-13-4.22(3)(b) (“Additional requirements for operating and maintaining a [municipal solid waste landfill] may be imposed by the Department, as deemed necessary to comply with the Act and this Division.”). Indeed, a comparison of variances across permits demonstrates ADEM’s exercise of this authority. See Ala. Facility Comparison (Exh. 1).

In sum, ADEM has obligations under Title VI and has the broad authority and regulatory powers to ensure compliance with Title VI.

VI. EPA Has Sufficient Evidence to Determine that ADEM’s 2017 Permit Renewal Continues to Have a Racially Discriminatory Impact on the Predominantly Black Population of Ashurst Bar/Smith

Over the course of several years, ABSCO and other Ashurst Bar/Smith community members have provided EPA with extensive evidence that ADEM’s permitting practices relating to the Stone’s Throw Landfill—including, most recently, ADEM’s February 2017 permit renewal—disparately impacts the residents of the predominantly Black Ashurst Bar/Smith community. For example, since 2003, when Ex. 6 Personal Privacy (PP) who has enduring familial ties to that community, formally complained to EPA about the Landfill’s adverse impacts on the Ashurst Bar/Smith community, EPA has been on notice of the Landfill’s various harms, including, but not limited to: the perceived contamination of local well, spring, surface, and public water; the devaluation of Black-owned property; and its negative impact on wildlife, and residents’ livestock,

and gardens.²¹ *See also* Letter from Marianne Engelman Lado, Earthjustice & Leah C. Aden, Senior Counsel, NAACP LDF et al., to Russell A. Kelly 6-7 (Nov. 7, 2016).

As additional harms have emerged, ABSCO and other community members have continued to document the Landfill's adverse impacts, including, but not limited to: various safety risks posed by the garbage truck-travel in and out of Ashurst Bar/Smith; putrid smells; persistent bugs and other pests emanating from or attracted to the Landfill; various health impacts; noisome Landfill operations outside of normal business hours; and deterioration in the quality of life of residents. *See, e.g., id.* at 7; ADEM RESPONSE TO COMMENTS. As ABSCO has already explained, these previously-documented adverse impacts have persisted for years. They should have been considered by ADEM *before* it granted the 2017 Permit application, and they should be considered by EPA now, as the agency evaluates the cumulative harms inflicted on Ashurst Bar/Smith from the Landfill's inception through ADEM's 2017 Permit renewal. *See, e.g.,* Letter from Marianne Engelman Lado, Visiting Clinical Prof. of Law, Yale Law School Env'tl. Justice Clinic & Leah Aden, Senior Counsel, NAACP LDF *et al.*, to Lilian Dorka, Acting Dir., Env'tl. Prot. Agency, External Civil Rights Compliance Off. *et al.* 2-3 (Apr. 18, 2017). As recently as the summer of 2018, when EPA representatives visited the Ashurst Bar/Smith community and interviewed various community members, residents have reiterated these continuing harms to EPA. The evidence individually and collectively provided to EPA from 2003 to the present is more than adequate to justify a finding that ADEM's 2017 permitting of Stone's Throw Landfill has a racially discriminatory impact in violation of Title VI and its implementing regulations.

²¹ All of the record evidence submitted in support of ABSCO's 2003 complaint remains relevant to the pending complaint and ongoing harms experienced by Black residents of Ashurst/Bar Smith and are incorporated by reference.

A. Quality of Life, Odor, and Ability to Use and Enjoy Black-Owned Property

Ashurst Bar/Smith residents have repeatedly attested that the Landfill diminishes their quality of life and ability to use and enjoy their property. As the EPA is well aware, Black families have owned much of the land in this close-knit community since their successful fight for emancipation from *de jure* and *de facto* chattel slavery in the late 19th century. *See, e.g.* [Ex. 6 Personal Privacy (PP)]

[Ex. 6 Personal Privacy (PP)] ¶ 7 (July 29, 2016) (Exh. 12); [Ex. 6 Personal Privacy (PP)] ¶ 21 (Exh. 15).

Despite having held this land in their families for over 100 years, community members today are all but constructively evicted from their homes due to the Landfill's impacts. Residents universally decry the "overpowering" and "putrid" stench emanating from the Landfill and its methane flares. *See, e.g.*, [Ex. 6 Personal Privacy (PP)] Decl. ¶ 4 (Aug. 17, 2016) (Exh. 10); [Ex. 6 Personal Privacy (PP)] ¶ 10 (Exh. 15). In a 2016 community survey (which was provided to EPA), all participants reported foul odors coming from the Landfill, which they described as a stench of "decay," "rot," "dead animals," "pesticides," and "gas." Letter from Marianne Engelman Lado, Earthjustice & Leah Aden, Senior Counsel, NAACP LDF, to Betsey Biffel, Att'y Adviser, Off. of Gen. Couns., Env'tl. Prot. Agency 5 (Sept. 16, 2016) ("Sept. 16, 2016 Letter").²² Consistent with the community's perceptions, a 2018 analysis of outdoor ambient air quality near the Landfill revealed hydrogen sulfide (H₂S) levels approaching the odor threshold of 8 ppb. *See* PILOT STUDY, at 2-3, 5 (Exh. 6). Because this study was conducted in the spring of 2018, and "warmer temperatures and higher humidity conditions may increase H₂S levels," the report posits that it is possible that H₂S—and the malodor that it causes—are likely even worse during the summer. *Id.* at 3, 39.

During EPA's site visit in 2018, residents, including [Ex. 6 Personal Privacy (PP)] stated that the odors lead them and many others to avoid driving past the Landfill, even if it then

²² The September 2016 letter summarized the results of a survey administered to 44 residents of Ashurst Bar/Smith in 2016.

takes them longer to reach their destinations. EPA representatives also stated that they smelled these noxious odors during their 2018 site visit. The stench is so intense that residents are often unable to comfortably sit outside their homes or to gather outdoors for family events like barbecues. *See, e.g.*, [Ex. 6 Personal Privacy (PP)] 30 (Exh. 12); [Ex. 6 Personal Privacy (PP)] ¶ 12 (Exh. 15); [Ex. 6 Personal Privacy (PP)] ¶ 31 (Exh. 14); *see also* PILOT STUDY, at 55 (82.4% of 74 survey respondents report avoiding going outside because of poor air quality) (Exh. 6); *id.* at 69 (“[I]ndividuals avoid spending extensive amounts of time outside . . . during extreme heat, and when smells are particularly noticeable.”).²³ During EPA’s site visit, other residents, such as [Ex. 6 Personal Privacy (PP)], explained that family members no longer visit them because of the odor stemming from the Landfill. At least one resident reported to the EPA that she no longer hangs her laundry outside and will not even open her windows due to the Landfill’s odor. *See, e.g.*, Oral Interview with [Ex. 6 Personal Privacy (PP)] (Nov. 2017). Preliminary air quality analyses lend credence to these concerns: in addition to hydrogen sulfide levels near the olfactory threshold, the Pilot Study showed elevated levels of pollutants known to cause health problems including (1) non-methane volatile organic compounds (NMVOCs),²⁴ and (2) particulate matter (PM) size less than 2.5 micrometers (PM_{2.5}).²⁵ PILOT STUDY, at 2-4, 9 (Exh. 6).

In short, both anecdotal reports of intolerable smells and empirical analysis of air quality in the Ashurst Bar/Smith community substantiate Complainant’s assertions that the Landfill is

²³ Counsel for ABSCO provided [Ex. 6 Personal Privacy (PP)] declaration to EPA by email dated August 9, 2018.

²⁴ Observed NMVOC levels ranged from 0 to 4336 ppb, with average values over periods of one to six hours ranging from 0 to 2601 ppb. The United States does not have federal NMVOC standards, but under the German guideline for schools, long-term NMVOC concentrations should not exceed 220 ppb. *See* PILOT STUDY, at 3 (Exh. 6).

²⁵ Observed PM_{2.5} concentrations ranged from 0 to 58.5 µg/m³, with average concentrations ranging from 3.2 to 14.5 µg/m³. These elevated concentrations are concerning: negative health impacts from PM_{2.5} have been observed even at the lowest levels of exposure, though the levels measured in the 2018 Pilot Study did not exceed the World Health Organization’s or U.S. Environmental Protection Agency’s 24-hour limits.

polluting the air. These adverse impacts—especially the odor problem—are likely related to ADEM’s decision to grant the Landfill an exceptionally permissive variance regarding its use of alternative (also called alternate) daily cover (“ADC”). *See, e.g.,* Patrick J. Solan et al., *Evaluation of the Odour Reduction Potential of Alternative Cover Materials at a Commercial Landfill*, 101 BIOSOURCE TECH. 1115 (2010) (discussing the importance of odor control and noting that alternative daily covers are supposed to reduce odor nuisances). ABSCO has submitted photographs documenting and corroborating observations by residents of the Ashurst Bar/Smith community that trash is inadequately covered by tarps after hours, contributing to adverse odors, interfering with quality of life, and attracting vultures and other pests. *See* Emails from Marianne Engelman Lado, to Dale Rhines (Oct. 11, 2018) (photographs attached). Unlike other similar landfills in Alabama (*i.e.*, those permitted for 1,500 tons of waste per day), Stone’s Throw is subject to a relatively unrestrictive variance governing its use of ADCs: it may utilize “tarps,” and “contaminated soils and petroleum contaminated soils,” or “automotive shredder residue” (only if “used to cover the cell’s interior slopes, deck and workface”). *See* Permit No. 62-11, Section III.H. In comparison, some Landfills are not allowed to use alternate daily cover, while others are permitted to use potentially less-polluting options, such as “spray-on, polymer-based materials” or “reusable geosynthetic covers.” *See* Permit No. 41-03. At the very least, due diligence is required to determine whether ADEM’s permissive variances, specifically that ADEM’s decision to allow Stone’s Throw to use tarps as an ADS, are contributing to air pollution in Ashurst Bar/Smith in violation of Title VI.

Furthermore, the Landfill’s location—adjacent to the local A.M.E. Zion Church, a community institution for more than 80 years—has impeded the community’s ability to congregate for worship and fellowship. *See, e.g.,* Letter from Marianne Engelman Lado & Leah C. Aden, to

Russell A. Kelly 6-7 (Nov. 7, 2016). As the Pastor of A.M.E. Zion reported to EPA, the Landfill has prompted an exodus of church leadership and membership. *See, e.g.*, [Ex. 6 Personal Privacy (PP)] (Aug. 2016) (Exh. 17). [Ex. 6 Personal Privacy (PP)] further reported during the EPA's 2018 site visit that the church no longer holds a bible school nor any outdoor activities, and other residents have also bemoaned this loss to the community. The church has been forced to expend resources on air filters, plastic covering for the floor, buying new soil, and other measures, in an effort to try to minimize the odor and insects from entering the church. *Id.*; *see also* PILOT STUDY, at 67 (Exh. 6).

The Landfill also has drastically impinged on residents' ability to use and enjoy their land. Where residents were once able to maintain and use gardens, fish in local waterways, eat fruit from trees, and raise livestock, they now fear that the Landfill and its impact on water, soil, and air has rendered such activities unsafe. *See, e.g.*, [Ex. 6 Personal Privacy (PP)] ¶ 3 (Exh. 10); Sept 16, 2016 Letter, at 2; [Ex. 6 Personal Privacy (PP)] ¶¶ 19-20 (Exh. 14). During the 2018 EPA site visit, EPA representatives observed trees that no longer bore fruit outside of the A.M.E. Zion Church.

B. Destruction of Historically Black Community and Diminution of Property Value

Economic literature widely accepts that landfills can decrease the value of properties up to three miles away, with impacts growing more negative the closer the property is to a landfill. *See, e.g.*, Stephen Farber, *Undesirable Facilities and Property Values: A Summary of Empirical Studies*, 24 ECOLOGICAL ECON. 1 (1998); Diane Hite et al., *Property-Value Impacts of an Environmental Disamenity: The Case of Landfills*, 22 J. REAL ESTATE FIN. & ECON. 185 (1995); Joseph Havlicek Jr. et al., *Measuring the Impacts of Solid Waste Disposal Site Location on Property Values*, 53 AM. J. AGRIC. ECON. 869 (1971). As the attached study by Dr. Ermanno Affuso shows, the Stone's Throw Landfill's negative effects on nearby property values are no

different. *See* PROPERTY VALUE STUDY, at 15 (Exh. 3). Dr. Affuso compared the median property values in all Alabama census tracts that contain landfills or have landfills within two miles of their borders (“landfill census tracts”), with all other Alabama census tracts without landfills (“clean census tracts”), and found, with 99% statistical confidence, a negative effect on the value of properties located near landfills. *See* PROPERTY VALUE STUDY, at 13 (Exh. 3). Specifically, the analysis found that, controlling for other factors, the presence of a nearby landfill can decrease property values by up to 28%. *Id.* at 19-21. It is thus “*extremely likely* that the presence of sizeable municipal disposal facilities processing more than 1,000 metric tons daily [such as the Stone’s Throw Landfill] damages properties located within three miles.” *Id.* at Executive Abstract (emphasis added). Indeed, when comparing the Stone’s Throw census tract to the most socioeconomically similar “clean” census tract in Alabama, the median property value is 14% lower in the Stone’s Throw census tract than the similar census tract without a landfill. *Id.* at 15.

The Ashurst Bar/Smith community is keenly aware that the Stone’s Throw Landfill has greatly decreased the value of their property—property that has been handed down for generations since the time of Reconstruction. Longtime residents either have been displaced by the Landfill’s operations or have seen their property values decline. *See, e.g.,* Sept. 16, 2016 Letter, at 3; Ex. 6 Personal Privacy (PP) Decl. ¶ 20 (Exh. 12); Ex. 6 Personal Privacy (PP) Interview; Oral Interview with Ex. 6 Personal Privacy (PP) (Nov. 2017). Many community members perceive that the Landfill has depreciated property values, noting that “nobody wants to buy ‘contaminated’ land in their community;” that they “actually tried to sell their property but were unsuccessful;” or that they “moved away from their home—or knew of former residents who moved—just to get away from the Landfill.” *Id.*; *see also, e.g.,* PILOT STUDY, at 50, tbl.12 (68.9% of those surveyed said that they were extremely concerned about a decrease

in property value; fully, 94.6% were concerned, very concerned, or extremely concerned) (Exh. 6); Sept. 16, 2016 Letter.

Because of the harmful impacts that the Landfill has wrought on their community, some residents painfully have abandoned their plans to spend their retirement years in the close-knit Ashurst Bar/Smith community. *See, e.g.,* [Ex. 6 Personal Privacy (PP)] Decl. ¶ 38 (Exh. 12); [Ex. 6 Personal Privacy (PP)] Decl. ¶ 10 (May 12, 2016) (Exh. 9). *See* ABSCO, Map of Black-Owned Land in Ashurst Bar/Smith Community and Landfill Development (1992) (Exh. 19). Sociological studies likewise support residents' perceptions of devaluation, demonstrating that foul odors like those afflicting Ashurst Bar/Smith can cause decreases in property values and other economic disadvantages, in addition to extreme annoyance and emotional disturbances. *See* PILOT STUDY, at 10 n.8.

Not only has the Landfill decreased the value of predominantly Black-owned properties, but it also has itself taken over surrounding properties as the Landfill has greatly expanded over the years. For example, during EPA's site visit, [Ex. 6 Personal Privacy (PP)] pointed out specific land that the Landfill has encroached upon and claimed from Black families. During that same site visit, [Ex. 6 Personal Privacy (PP)] informed EPA representatives that the Landfill now owns a part of the driveway to A.M.E. Zion and that—according to one congregant—the Landfill has threatened to block people from coming into that community church.

C. Landfill-Related Traffic and Risks to Safety

ABSCO members and other community members have continually described to EPA how the Landfill creates other unsafe living conditions in Ashurst Bar/Smith. In particular, residents have consistently criticized how the large waste disposal trucks travel the narrow, unmarked two-lane community roads, often at unsafe, fast speeds as they access the landfill. *See, e.g.,* [Ex. 6 Personal Privacy (PP)] Decl. ¶ 5 (Exh. 9); [Ex. 6 Personal Privacy (PP)] Decl. ¶¶ 42-50 (Exh. 14). Truck traffic to and from the

Landfill is frequent, with hourly vehicle counts peaking at 48 (including 23, 18-wheeled semi-trucks).²⁶ PILOT STUDY, at 4 (Exh. 6). During a November 2017 call with EPA and again at the 2018 site visit, resident [Ex. 6 Personal Privacy (PP)] expressed concern that her young grandchildren were unsafe while riding in school buses because of the failure of trucks traveling to and from the Landfill to observe traffic rules. Indeed, [Ex. 6 Personal Privacy (PP)], a school bus driver who has enduring family ties to Ashurst Bar/Smith, recounted in a November 2017 EPA interview how the Landfill's truck drivers refuse to yield to her school bus and speed along the narrow roads. This is consistent with testimony from residents that the "highest truck traffic hours are between 5:00-7:00 am and between 2:00 and 4:00 pm, which coincides with when children are getting on and off school buses." PILOT STUDY, at 45 (Exh. 6). Moreover, EPA representatives observed these speeding trucks during the 2018 site visit while sitting on [Ex. 6 Personal Privacy (PP)] front porch. EPA representatives also heard from various members of the [Ex. 6 Personal Privacy (PP)]

[Ex. 6 Personal Privacy (PP)] during the site visit, that the traffic was less than normal, probably due to an awareness of EPA's presence in the community. Other residents have witnessed these trucks getting into accidents and have seen trash flying from them, which they explained during EPA's 2018 visit.²⁷ See, e.g., [Ex. 6 Personal Privacy (PP)] Decl. ¶¶ 33-37 (Exh. 14); [Ex. 6 Personal Privacy (PP)] Decl. ¶ 20 (Exh. 15); Oral Interview with [Ex. 6 Personal Privacy (PP)] (July 31, 2018). In addition to safety concerns, the frequent truck traffic also produces distressing levels of noise, including well outside of business hours. [Ex. 6 Personal Privacy (PP)] Decl. ¶ 19 (Exh. 15). This too is supported by empirical evidence: the highest

²⁶ Though risks from traffic may be under the jurisdiction of ALDOT, harms associated with landfill-related traffic are nonetheless adverse impacts from the landfill and cognizable. See DOJ MANUAL, SECTION VII, at 4 ("EPA will also consider non-health harms, including, among other things, economic (e.g., depressed property values), nuisance odors, traffic congestion, noise and vermin. With respect to the non-health harms alleged (e.g., economic, traffic, noise), Title VI allows agencies to consider whether these effects are occurring and, if so, whether they are sufficiently harmful to support a violation finding.").

²⁷ 93.2% of survey respondents expressed concern about litter in the community connected to the Landfill, with 85.1% "very" or "extremely" concerned. PILOT STUDY, at 50 (Exh. 6).

maximum daytime noise levels observed ranged from 76.5 dBA to 98.1 dBA.²⁸ And residents have explained how the truck-traffic to and from the Landfill on these narrow, rural roads has also led to the physical deterioration of the roads and bridges. *See, e.g.*, [Ex. 5 Personal Privacy (PP)] Decl. ¶ 39 (Exh. 14).

D. Landfill-Related Increase in Vultures and Other Pests

Residents also complained to EPA of the influx of vultures, crows, feral dogs, and other vermin to the community, which is driven by the Landfill and which further exacerbates residents' health and safety concerns. *See, e.g.*, [Ex. 6 Personal Privacy (PP)] Decl. ¶ 15 (Exh. 15); [Ex. 5 Personal Privacy (PP)] Decl. ¶ 32 (Exh. 12); [Ex. 6 Personal Privacy (PP)] Decl. ¶ 7 (Exh. 10); Sept. 16, 2016 Letter. ABSCO and other community members have not only communicated these concerns to EPA in letters and formal complaints, but, as recently as January 2018 and September 11, 2018, ABSCO also provided EPA with photographs of vultures gathering at the Landfill. Of those surveyed, 78.87% of residents expressed concern about the number of animals drawn by the Landfill to the area, with 67.6% "very" or "extremely" concerned. PILOT STUDY, at 76 (Exh. 6).

E. Risks to Surface, Ground and Drinking Water

The community remains particularly worried about water contamination stemming from the Landfill. In this rural, close-knit community, where residents once relied on well water, many now fear well water contamination. *See, e.g.*, [Ex. 6 Personal Privacy (PP)] Decl. ¶ 17 (Exh. 15). As a result, most residents, many of whom are impoverished, save for the land that they may own, now purchase bottled water and/or public water, even though both options can be a significant financial burden. *See, e.g., id.; see also* Sept. 16, 2016 Letter, at 4–5; [Ex. 6 Personal Privacy (PP)] Interview. Residents have expressed concerns about water pollution beyond their wells: they also have reported

²⁸ According to the Pilot Study, although neither Alabama nor any municipalities appear to have enacted community noise standards, the noise levels observed near the Landfill are troubling. For context, if Connecticut's noise standards were applied to Tallassee, the Landfill would be in violation of the 61 dBA daytime maximum noise level guideline.

contamination of wetlands, natural springs, and groundwater. *See, e.g.*, Letter from Marianne Engelman Lado, Visiting Clinical Prof. of Law, Env'tl. Justice Clinic, Yale Law School, Leah Aden, Senior Counsel, NAACP LDF *et al.*, to Lilian Dorka, Acting Dir., Env'tl. Prot. Agency, External Civil Rights Compliance Off. *et al.* 5 (Apr. 25, 2017). For example, during a November 2017 call with EPA representatives, community resident Ex. 6 Personal Privacy (PP) with whom the EPA also met with during the 2018 summer site visit, described “water runoff” flowing from the Landfill’s buried trash.²⁹

As far as ABSCO is aware, no one from the Landfill or any Alabama official has tested the water from their springs, community waterways, or other water sources to allay these concerns about contamination. However, counsel for Complainant has provided EPA with a copy of one study, conducted on behalf of the Ashurst Bar/Smith community, which indicates that local wells and a spring within the community were tested in or around 2000. *See* WHATLEY DRAKE, L.L.C., ASHURST BAR/SMITH COMMUNITY ORGANIZATION TALLASSEE WASTE DISPOSAL FACILITY PRELIMINARY ENVIRONMENTAL INVESTIGATION (May 2000) (Exh. 8). Those tests found that water from one of the underground springs and a well that people were drinking from contained arsenic, toluene, and lead. *Id.*; *see also* Smith Decl. ¶ 17 (Exh. 15). ADEM also has raised concerns about

²⁹ Residents of Ashurst/Bar Smith are not the only ones to raise concerns about water contamination stemming from the Landfill. In an August 1, 2018 email to EPA representatives, counsel for ABSCO directed EPA’s attention to *Tarver, Sr. v. Advanced Disposal Servs. South, LLC*, an action filed in Alabama state court on July 27, 2018. Among other allegations, plaintiffs in that case claim that Advanced Disposal has been dumping leachate generated by the Landfill in excess of limits prescribed in a leachate agreement with Tallassee. Based on these allegations, counsel for ABSCO believe that there remain serious outstanding questions about: (1) whether and how excessive leachate disposal in the Tallassee Sewer Stabilization Pond has contributed to Tallassee’s inability to process wastewater, causing adverse impacts downstream; (2) whether ADEM knew or should have known that Advanced Disposal was engaged in these practices and that they were resulting in negative impacts; and (3) whether ADEM has done any independent analysis of the problem, including examining the quality or quantity of the leachate before approving the 2017 permit for Stone’s Throw; or (4) whether ADEM has reassessed permit conditions such as the variance for leachate recirculation in light of this information. By an earlier letter dated March 5, 2018, counsel for ABSCO directed the EPA to at least four other pending lawsuits that call into question ADEM’s permitting practice and process.

the Landfill's practices for preventing water pollution. For example, in July 2015, an ADEM inspection of the Landfill exposed potential violations of Alabama environmental laws and the Landfill's General National Pollutant Discharge Elimination System ("NPDES") Permit No. ALG160159, including:

1. Appropriate, effective Best Management Practices (BMPs) for the control of pollutants in stormwater run-off have not been fully implemented and regularly maintained to the maximum extent practicable resulting in the potential for uncontrolled discharges of sediment and other pollutants to a water of the State of Alabama. (Permit Part III. A).
2. Effective stabilization practices designed to dissipate stormwater runoff energy and provide for non-erosive flow velocity at stormwater discharge outlets to prevent erosion in downgradient drainage features or water(s) of the State have not been fully implemented and/or maintained. (Permit Part III. A. 2).
3. Sediment accumulation in the sediment basin or other treatment structure appears to be excessive, resulting in the potential for noncompliant discharges from reduced treatment/storage capacity. (Permit Part III. A. 13(b)).

Letter from Shelane P. Bergquist, Chief Facilities Unit, Ala. Dep't of Env'tl. Prot., to Charlie Gray, Tallassee Waste Disposal Ctr., Inc. (July 10, 2015). Similarly, in October 2007, ADEM issued a notice of violation to the Landfill for "the unapproved placement of a special waste in the lined cell at Stone's Throw Landfill." *See* ALA. DEP'T OF ENVTL. MGMT, NOTICE OF REGISTRATION FOR TALLASSEE WASTE DISPOSAL CENTER, INC. 9-10 (August 11, 2010). There also is evidence that the Landfill has not been abiding by the rules governing its leachate dumping practices, perhaps further contributing to contamination of surrounding waters. *See Tarver v. Advanced Disposal Services South, LLC et al*, 46-cv-2017-999076.00 (Amended Complaint, filed Cir. Ct. Macon County, July 27) ¶¶ 46-47 (list of violations by Landfill during period 2011 to 2017, including during time period when ADEM was reviewing the Landfill's permit). After Mayor Hammock instituted a system to monitor the Landfill's leachate dumping practices, it became clear that the Landfill was exceeding its 24,500-gallon daily leachate-dumping limit by about 17,500 gallons

(almost 200% of the limit). Given the presence of poisonous compounds, like toluene, arsenic, and lead, in the water during the early 2000s, ADEM's aforementioned concerns about the Landfill's practices for managing water pollution, and the Landfill's history of violating its leachate disposal duties, ADEM should have—at the very least—further monitored groundwater and surface water for empirical corroboration of residents' perceptions of contamination *before* renewing the Landfill's Permit.

F. Risks to Physical and Mental Health

Finally, community members have repeatedly expressed fears that the Landfill has been negatively impacting their health. In a 2016 community survey conducted by ABSCO's counsel, residents reported eye problems, dry throats, and skin problems, which they perceive to be caused by Landfill contamination. Sept. 16, 2016 Letter. In the 2018 Pilot Study, residents of Ashurst Bar/Smith also reported health concerns including breast, colon, kidney, and prostate cancers, asthma and other respiratory problems, memory problems, sleep apnea, and diabetes in adults, as well as asthma and other respiratory problems, nosebleeds, vomiting, and skin problems in children. PILOT STUDY, at 5, 22–23 (Exh. 6); *see also* Sept. 16, 2016 Letter (raising similar concerns about the Landfill's health impacts); [Ex. 6 Personal Privacy (PP)] Decl. ¶¶ 11-15 (same) (Exh. 14).³⁰ Similarly, during her EPA interview in November 2017, [Ex. 6 Personal Privacy (PP)] relayed that she observed

³⁰ Twenty-nine percent of respondents reported being told by a doctor that they have asthma and 21% reported being told by a doctor that they have chronic obstructive pulmonary disease. For both conditions, these figures were almost double the statewide prevalence in Alabama. PILOT STUDY, at 81 (Exh. 6). It is also worth noting, based on the Pilot Study, that the health conditions associated with PM inhalation, *see supra* note 25 and accompanying text, include irritation of the eyes, nose and throat, decreased lung function, coughing, phlegm, chest tightness, shortness of breath, acute bronchitis, aggravated asthma, irregular heartbeat, nonfatal heart attacks, strokes, lung cancer, and premature death. *Id.* at 15. Many NMVOCs, *see supra* note 24 and accompanying text, are categorized as hazardous air pollutants regulated under the Clean Air Act, and NMVOCs can also react with nitrogen oxides and sunlight to form ground-level ozone. In turn, ozone can cause wheezing and shortness of breath and can also increase the frequency of asthma attacks, lung infection, and cause chronic obstructive pulmonary disease. *Id.* at 11-12.

schoolchildren suffering from irritated eyes, nose bleeds, and vomiting as she drove them to the community elementary school. In community surveys, residents have also reported negative health impacts on animals, both wild and domestic, which ended up sick or dead. *See, e.g.*, Sept. 16, 2016 Letter. Most recently, during a 2018 EPA site visit, residents like members of the Ex. 6 Personal Privacy (PP) family, **Ex. 6 Personal Privacy (PP)** recounted health problems ranging from cancer to congenital problems to asthma and respiratory issues, all of which they connect to Landfill contamination. In 2018, 84.94% of survey respondents rated their living environment “unhealthy” or “very unhealthy.” PILOT STUDY, at 79 (Exh. 6).

With all of that said, the most frequently mentioned, and perhaps most distressing, impact of the Landfill involved its psychological effects on residents. Survey responses revealed a community that felt “dehumanized,” citing experiences of anxiety, fear, depression, and stress, as well as feelings of defeat and isolation. *See, e.g.*, Sept. 16, 2016 Letter. During the 2018 EPA site visit, one resident, **Ex. 6 Personal Privacy (PP)** which has multiple generations living near one another and the Landfill, exclaimed that she does not invite people to come to her house because it is an “embarrassment” to be associated with the Landfill (Aug. 1, 2018). Her sister, Regina Murphy, unfortunately had to stress that “we are human,” speaking of Ashurst Bar/Smith residents and explaining her failure to understand how they can be treated with such disregard by everyone who allows the Landfill to devastate their community.

Social science supports these human responses to the Landfill’s impact on the community. *See, e.g.*, PILOT STUDY, at 10 n.8 (providing that “sociological studies have shown that odors [associated with landfills] can cause extreme annoyance and emotional disturbances”) (Exh. 6).

For these and other reasons, the Landfill has made these “famil[ies]’ land unbearable to live on.” Ex. 6 Personal Privacy (PP) Decl. ¶ 7 (Exh. 12). Thus, the evidence presented to EPA of the Landfill’s adverse

impact upon Ashurst Bar/Smith's predominantly Black Community is overwhelming and undeniable.

VII. Any Resolution of the Complaint Must Require That ADEM Mitigate Discriminatory Impacts

The Stone's Throw Landfill has devastated the Ashurst Bar/Smith community. Families formerly living on Washington Boulevard have been displaced, residents are concerned about their health and safety, and the AME Zion Church has become a shadow of its former self, no longer holding summer camp or outdoor activities for children in the community and dwindling in numbers because members of the congregation have to contend with a putrid smell when attending church. *See e.g.* Oral Interview with [Ex. 6 Personal Privacy (PP)] (July 31, 2018). To be clear, EPA should find that ADEM has discriminated on the basis of race in violation of Title VI and EPA's implementing regulations and withhold federal funds unless and until ADEM comes into compliance with Title VI.

With knowledge of concerns raised repeatedly by members of the community, including during the notice and comment period for the Permit in 2016, ADEM should have, at the very least, conducted an analysis to determine whether the continued operation of the facility complied with Title VI and EPA regulations and investigated community concerns. Instead, ADEM reissued the operating Permit, disregarding specific red flags about contamination at Tallassee's wastewater treatment facility and community concerns about the impact of the Landfill on quality of life, odor, property value, vermin and other pests, and water quality. Simply put, this Landfill should not be allowed to continue to destroy this historic Black community.

At the very least, ADEM should have adopted less discriminatory alternatives including stricter permit requirements—including provisions required at other landfills in Alabama, and

mitigation of harms. *See, e.g.*, EPA TOOLKIT, at 15 (“Assuming [a recipient] establishes [a substantial legitimate] justification [for the challenged policy or practice], EPA must further look to determine whether there are less discriminatory alternatives; that is, approaches that cause less disparate impact but are practicable and comparably effective in meeting the needs identified by recipient. For example, EPA may find evidence that [the agency] had the capacity to prevent any adverse and disproportionate effects by requiring that the facility be operated in a manner that would eliminate or mitigate its disproportionate impact.”).

Assuming *arguendo* that ADEM could demonstrate a substantial legitimate justification for the decision to reissue the permit without further investigation or greater protections in the face of these impacts and concerns, ADEM’s decision nevertheless violates federal civil rights laws if the evidence shows that ‘less discriminatory alternatives’ exist.” *See* EPA TOOLKIT, at 9-10. Less discriminatory alternatives are defined as “approaches that cause less disparate impact” and are comparably effective in meeting the needs of the funding recipient. *Id.* at 15. Examples of less discriminatory alternatives include “modifying permit conditions or employing practicable mitigation measures to lessen or eliminate the demonstrated adverse disparate impacts; or by not renewing the permit.” *Id.* In accordance with Title VI, EPA must require that ADEM implement less discriminatory alternatives and mitigate existing harms as a condition of receiving further federal funding.

Under its statutory mandate, ADEM is tasked with “protect[ing] the public health and the state’s environmental quality” through the “orderly management of solid wastes.” ALA. CODE § 22-27-41. The Alabama state legislature has broadly construed ADEM’s power to manage public wastes, giving ADEM discretion “[t]o do any and all actions . . . necessary and proper for the effective enforcement of [the SWDA].” *Id.* § 22-27-12(11). Moreover, ADEM may “[i]ssue

permits, notices, and orders, specify the terms and conditions of permits or notices, conduct inspections, require that records be established and maintained, direct the abatement of unauthorized dumps or other public nuisances involving solid waste, and implement the rules and standards adopted pursuant to [the SWDA].” *Id.* § 22-27-12(3).

As discussed above, *see supra*, ADEM has broad authority under state and federal law to impose stricter permit conditions and otherwise mitigate harm to adversely affected communities. Below please find measures that would help to mitigate the discriminatory impacts of the operating permit on residents of the Ashurst Bar/Smith community:

A. ADEM Must Strengthen Permit Conditions

ADEM has the power to strengthen protections through conditions placed on individual permits at the agency’s discretion. *See* ALA. ADMIN. CODE r. 335-13-4.11 (establishing that nothing in ADEM’s hydrogeology standards “shall prevent the Department from requiring an additional buffer as it may deem appropriate with respect to a particular site,” among other things); *see also id.* r. 335-13.4.15 (“[d]aily, weekly, or some other periodic cover shall be required at all landfill units, as determined by the Department; *id.* r. 335-13-4.16(b) (discretion regarding requirements to install permanent gas monitoring structures, gas vents, gas control or recovery systems); *id.* r. 335-13-4.22(3)(b) (“additional requirements for operating and maintaining a [municipal solid waste landfill] may be imposed by the Department, as deemed necessary to comply with the Act and this Division”). ADEM also has broad statutory authority to place health and safety requirements on landfills through the promulgation of general regulations, which are then incorporated into individual permits. *See* ALA. CODE § 22-27-12(1) (granting ADEM the authority to adopt rules to implement the regulation of waste facilities); *see also id.* § 22-27-12(2) (granting ADEM the power to issue permits and to “specify the terms and conditions of permits”).

First, ADEM should revoke the variance allowing for alternate daily cover and instead require that all open faces be covered with at least six inches of compacted soil to reduce air pollution as well as to protect against animal populations that are attracted to the garbage. *See* Permit No. 62-11, Section X.6 (variance allowing tarps and other alternate daily cover). ADEM should also make it a condition of the Permit that the Landfill operators provide documentation that the open faces are fully covered at night, and that closed cells are revegetated. ADEM retains the authority to impose recordkeeping and reporting requirements on solid waste facilities. *See* ALA. ADMIN. CODE r. 335-13-14-.08. Moreover, ADEM can require certifications of “the normal operations of the facility.” *Id.* r. 335-13-14-.08(1)(b). Likewise, ADEM should limit the Landfill exposure to one face at a time and revoke the permit variance that exempts the Landfill from the requirement of exposing the smallest open area at a time. *See* Permit No. 62-11, Section X.5 (variance waiving the requirement that waste be confined to as small a space as possible and allowing more than one working face). Further, ADEM should downsize the amount of solid waste the Landfill is allowed to receive annually and include this reduction as a Permit condition. Moreover, given the risks associated with traffic involving longer-haul trucks carrying waste from longer distances, Stone’s Throw should not be allowed to receive waste from long-distances, including out-of-state counties.

B. ADEM Must Mitigate Adverse Impacts

1. Health Impacts

ADEM must either provide, or, as a Permit condition, require the Landfill to provide, resources for community-based testing and monitoring of air and water, including groundwater and public water. Given concerns raised about contamination on this site—concerns dating back to 2000, when initial testing conducted at the expense of community landowners found evidence

of groundwater contamination, Ashurst Bar/Smith residents deserve the benefit of third-party testing. *See* LANI MERRITT, HISTORICAL PATTERNS OF LANDFILL LOCATIONS IN TALLAPOOSA COUNTY (Oct. 18, 2000). ADEM can and should make the results of all testing available and accessible to the community. Additionally, ADEM as part of its coordinated statewide effort to prevent both air and water pollution, should publicly disclose the content of specific waste deliveries to the Landfill.

Further, ADEM should make available community health monitoring, subject to the consent of all participants, to test for adverse health impacts, as well as working with state and county public health agencies to make health services available to Ashurst Bar/Smith residents. All community health monitoring must comport with requirements for informed consent, a requirement all the more critical in Tallassee. *See* Sandy Banisky, *At 95, Tuskegee Study Participant Herman Shaw Prefers Reconciliation to Recrimination, Forgiveness to Bitterness*, BALTIMORE SUN (August 24, 1997), http://articles.baltimoresun.com/1997-08-24/features/1997236123_1_tuskegee-study-tuskegee-syphilis-syphilis-study. While ADEM's operating regulations do not explicitly specify that public health monitoring occur, it is a logical extension of ADEM's mission, as a wide range of health concerns stem from breathing toxic air and drinking contaminated water. *See, e.g.*, PILOT STUDY (Exh. 6). Preventative measures should be taken now to prevent long-term health consequences. Public health monitoring is not an unusual remedy.

2. Infrastructure Impacts and Safety Issues

Many of the harms suffered by the Ashurst/Bar Smith community result from the inadequacy of local infrastructure to support a Landfill that serves every county in the state of Alabama and three counties in Georgia. Under the SWDA, ADEM is tasked with "evaluat[ing] .

. . . the environmental, economic and other relevant factors which would be implicated by acceptance of solid waste from beyond the boundaries of the region.” ALA. CODE § 22-27-41(a)(4). Eighteen-wheel trucks careen around corners on country roads not built or modified to serve this purpose. *See, e.g.*, Ex. 8 Personal Privacy (PP) Decl. ¶ 38 (Exh. 14). Accordingly, ADEM must ensure that the infrastructure needed for the operation of the Landfill is safe for the community. While ADEM itself does not have the authority to mandate transportation-related construction projects, ADEM can coordinate with the Alabama Department of Transportation (“ALDOT”) to remedy the failing rural infrastructure in and around the Ashurst Bar/Smith community. Indeed, the damage from the operation of the Landfill calls for action by ADEM.

To address increased Landfill-related traffic, ADEM, in consultation with ALDOT and the County Commission, must hold the Landfill responsible for road maintenance, especially for the heavily used Washington Boulevard. Similarly, because local bridges are in dire need of structural reinforcements, ADEM must demand that the Landfill prohibit trucks from using such bridges, and hold the Landfill responsible for enhancing the structural integrity of the bridges.

ADEM must also require that the Landfill coordinate with local law enforcement authorities to provide effective traffic monitoring to ensure that Landfill-related trucks obey speed limits. Such enforcement is necessary to protect school children as they board and exit school buses, especially on Washington Boulevard and Ashurst Bar Road. ADEM, in collaboration with ALDOT, can work with local authorities to mandate lower speed limits and the installation of traffic lights, additional speed limit and stop signs, and speed bumps.

C. ADEM Should Enhance Enforcement Activities

If the Landfill continues to operate in the Ashurst Bar/Smith community, ADEM must improve enforcement activities to remedy harms. Such enforcement mechanisms must be

stipulated in the operating permit for the Landfill and should be administered by ADEM and Landfill operators, and in coordination with local law enforcement authorities as necessary. “[ADEM] may condition the issuance of a permit for any solid waste management or materials recovery facility upon the facility being consistent with applicable rules as are necessary to carry out the intent of [the SWDA].” ALA. CODE § 22-27-41(2).

Given significant questions raised about the Landfill’s impact on water systems, ADEM should investigate the Landfill’s leachate collection and disposal. ADEM must also require that runoff and water generated by the Landfill operation be disposed of on Landfill property or under contract with a wastewater treatment facility rather than discharged across adjacent landowners’ property into Gleeden Branch and Mill Creek.

ADEM has a legal obligation to make unannounced “periodic evaluations of all solid waste disposal facilities,” and ADEM should use this authority to its fullest extent to ensure the Landfill’s compliance with Permit conditions. ALA. ADMIN. CODE r. 335-13-6-.01(1)(a). ADEM should also consult with local law enforcement to better enforce Landfill operational hours and prevent trucks from coming and going from the Landfill during the night. ADEM may “direct the abatement of . . . public nuisances involving solid waste.” ALA. CODE § 22-27-12(3).

Moreover, trucks traveling to the Landfill regularly release trash onto roads and local properties. ADEM must include a Permit condition holding the Landfill responsible for cleaning trash should it fall onto roadways. ADEM must also demand that the Landfill ensure that all Landfill-related trucks are securely covered to further reduce the incidence of roadside refuse. Because “regulations addressing the collection and transportation of solid waste remain within the function of the State Health Department,” ADEM should consult with the Alabama Department of

Public Health to establish more stringent regulations for solid waste transportation in the state of Alabama.

D. Additional Mitigation of Harm

ADEM should also provide or require the Landfill to provide resources to the community to mitigate the adverse impacts of the Landfill, including providing water filters to all residents. If groundwater in the Ashurst Bar/Smith community is found to be contaminated by testing, free water should be provided to the community, with the help of ADEM, until groundwater is cleared by further testing. Providing free water and water-testing kits to residents after their groundwater, well water, or tap water is found to be contaminated is not unusual and has been implemented in jurisdictions around the country. *See e.g.* STATE OF MICHIGAN, TAKING ACTION ON FLINT WATER, <https://www.michigan.gov/flintwater/> (last visited Oct. 10, 2018) (regarding water testing kits given to residents of Flint, Michigan).

These provisions are meant as illustrative: they are drawn from recommendations made by members of the Ashurst Bar/Smith community. At the same time, Complainant requests the opportunity to discuss less discriminatory alternatives and potential mitigation measures in advance of any discussions regarding resolution of the complaint.

VIII. Conclusion

For too long, ADEM has ignored its obligations under Title VI of the Civil Rights Act of 1964 and EPA's implementing regulations. Time and again, ADEM has issued, modified, and reissued the Permit to the Stone's Throw Landfill without regard for its devastating disparate impacts on the historic, Black Ashurst Bar/Smith community. ABSCO's previous 2003 complaint alleged that the Permit modification violated Title VI and EPA regulations, and EPA, after

examining only the impacts of changes made in that modification, ultimately found insufficient evidence of discrimination.

ABSCO's 2017 complaint, however, alleges that ADEM's decision to *reissue* the Landfill's operating Permit is racially discriminatory. Complainant has submitted significant evidence that ADEM's methods or criteria of administration, which neglected years of complaints that this Landfill was destroying the community and which wholly failed to evaluate whether the Permit complies with Title VI and agency regulations, adversely affected the community. But for the operating permit and its terms, this facility would not be able to operate in the middle of what was a tight-knit African American community. Moreover, Complainant has also submitted ample evidence that the Permit's terms, including variances allowing Stone's Throw to maintain more than one open face at a time, avoid compliance with the minimum open face requirement, and utilize alternate daily cover including tarps (which don't even begin to cover piles of trash on working faces), have adverse and disparate impacts on the basis of race.

ADEM must be held accountable for violations of Title VI: it has the authority to provide greater protections and, indeed, it grants permits with stricter provisions in other locations. ABSCO asks EPA to make findings of discrimination, and if ADEM refuses to comply with the law, to withhold federal funds. Complainant has labored under time pressure to corroborate concerns about pollution, contamination, and health impacts with documentation and information that EPA might find useful. Indeed, ABSCO has filed a FOIA request to get more information on how EPA evaluates the element of causation and is still waiting for a response. Complainants will continue to develop evidence, and if EPA requires more information to support findings of discrimination, ABSCO stands ready to assist.

Sincerely,



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Ex. 6 Personal Privacy (PP)

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On behalf of the Ashurst Bar/Smith Community
Organization.

LIST OF EXHIBITS

<u><i>Ex.</i></u>	<u><i>Description</i></u>
	<u>Reports and Charts</u>
<i>Exhibit 1</i>	Comparison of Key Provisions of Municipal Solid Waste Facilities in Alabama (as of 2016). Compiled by Elvis Acheampong and Caleb Northrop, Yale School of Forestry and Environmental Studies (Oct. 10, 2018)
<i>Exhibit 2</i>	EPA, EJ Screen Demographic Indicators (data accessed Oct. 11, 2018)
<i>Exhibit 3</i>	Ermanno Affuso, The Impact of Landfills on the Value of Residential Properties in Alabama (Oct. 1, 2018)
<i>Exhibit 4</i>	Ermanno Affuso <i>curriculum vitae</i>
<i>Exhibit 5</i>	Ermanno Affuso et al, <i>Social Media Sentiment and Market Behavior</i> , Empirical Economics (May 26, 2018)
<i>Exhibit 6</i>	Robert Dubrow et al, Air Quality Impacts of the Stone's Throw Landfill in Tallassee, Alabama: A Pilot Study (2018)
<i>Exhibit 7</i>	Transcript, Public Hearing on Application to Modify Permit Stone's Throw Landfill Permit No. 62-11 (Nov. 10, 2016)
<i>Exhibit 8</i>	Whatley Drake, L.L.C. Ashurst Bar/Smith Community Organization Tallassee Waste Disposal Facility Preliminary Environmental Investigation (May 2000).
	<u>Declarations and Comments</u>
<i>Exhibit 9</i>	Declaration of Charlie Cunningham (May 12, 2016)
<i>Exhibit 10</i>	Declaration of Kenneth Gauntt (Aug. 17, 2016)
<i>Exhibit 11</i>	Comments of Gail Gauntt (Summer 2016)
<i>Exhibit 12</i>	Declaration of Phyllis Gosa (July, 29, 2016)
<i>Exhibit 13</i>	Comments of Phyllis Gosa (Summer 2016)
<i>Exhibit 14</i>	Declaration of Regina Murphy (Aug. 1, 2018)
<i>Exhibit 15</i>	Declaration of Ronald Smith (Nov. 15, 2016)

Exhibit 16 Comments of Ronald Smith (Aug. 22, 2016)

Exhibit 17 Declaration of Gwen Tellis-Smith (August 2016)

Exhibit 18 Comments of ABSCO (Nov. 17, 2016)

Visual Images

Exhibit 19 ABSCO, Map of Black-Owned Land in Ashurst Bar/Smith Community and Landfill Development (1992).